

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRED WALKER,

Defendant.

Case No.: 2:03-cr-00516-GMN-PAL

ORDER

Pending before the Court is Defendant Fred Walker's Motion for Relief from Judgment or for Resentencing (ECF No. 138). The Government filed a Response (ECF No. 139) and Defendant filed a Reply (ECF No. 140). For the reasons discussed below, the Court denies the Motion.

I. BACKGROUND

On April 15, 2004, a jury convicted Defendant of possession with intent to distribute a controlled substance in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(iii), carrying a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A), and possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). (Jury Verdict, ECF No. 42). On November 2, 2004, the Court sentenced Defendant to life imprisonment for count one, ten years concurrent for count three, and five years consecutive for count two. (Judgment, ECF No. 64). On May 17, 2006, the Ninth Circuit affirmed Defendant's conviction and sentence. *See United States v. Walker*, 182 Fed. Appx. 655 (9th Cir. 2006).

On September 13, 2006, Defendant filed a Motion to Vacate his Sentence pursuant to 28 U.S.C. § 2255 (ECF No. 88), which was denied on December 29, 2006. (ECF No. 97).

1 Defendant has also filed additional motions to dismiss, for summary judgment, and to recall the
2 mandate (ECF Nos. 103, 104, 106, and 107), which have all been denied. (Order Denying
3 Motions, ECF No. 108). On March 5, 2015, over ten years after his sentence and conviction,
4 Defendant filed the pending motion seeking resentencing pursuant to 18 U.S.C. § 3559(c)(7).

5 **II. DISCUSSION**

6 Section 3559 provides enhanced penalties for certain violent felonies or serious drug
7 offenses. 18 U.S.C. § 3559. Subsection 3559(c)(7) states:

8 If the conviction for a serious violent felony or serious drug offense that was a
9 basis *for sentencing under this subsection* is found, pursuant to any appropriate
10 State or Federal procedure, to be unconstitutional or is vitiated on the explicit
11 basis of innocence, or if the convicted person is pardoned on the explicit basis of
12 innocence, the person serving a *sentence imposed under this subsection* shall be
resentenced to any sentence that was available at the time of the original
sentencing.

13 (emphasis added). Accordingly, subsection 3559(c)(7) only provides relief to Defendants who
14 were sentenced under section 3559. However, Defendant's life sentence enhancement was
15 given pursuant to 21 U.S.C. § 841 and 21 U.S.C. § 851. Therefore, because Defendant was not
16 sentenced under 18 U.S.C. § 3559 he is not entitled to relief under subsection 3559(c)(7). *See,*
17 *e.g., United States v. Sullivan*, No. 04-15050, 2005 WL 2090236, at *1 (11th Cir. Aug. 31,
18 2005) ("Because Sullivan's recently-vacated state conviction was not a basis for sentencing
19 him under § 3559(c) and because § 3559(c)(7) provides for resentencing only if one was
20 sentenced 'under this subsection,' Sullivan is not entitled to relief under § 3559(c)(7).").

21 Furthermore, even if Defendant had been sentenced under section 3559, subsection
22 3559(c)(7) would still not provide Defendant his requested relief. Defendant asserts that his
23 sentence should be reduced because his prior conviction is no longer classified as a felony and
24 is now classified as a misdemeanor. (Mot. for Relief at 3–5, ECF No. 138). However,
25 subsection 3559(c)(7) only provides relief if the conviction that was the basis for the

1 enhancement is found to be “unconstitutional or is vitiated on the explicit basis of innocence, or
2 if the convicted person is pardoned on the explicit basis of innocence.” 18 U.S.C. § 3559(c)(7).
3 Therefore, reclassification of his prior offense as a misdemeanor does not entitled Defendant to
4 relief under that subsection. *See United States v. Hays*, 399 F. App’x 4 (5th Cir. 2010)
5 (“Although Hays asserts that two of his prior convictions were dismissed, he does not argue
6 that those convictions were found to be unconstitutional or were vitiated on the explicit basis of
7 innocence or that he was pardoned on the explicit basis of innocence.”)

8 **III. CONCLUSION**

9 **IT IS HEREBY ORDERED** that Defendant’s Motion for Relief from Judgment or for
10 Resentencing (ECF No. 138) is **DENIED**.

11 **DATED** this 2nd day of July, 2015.

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16 Gloria M. Navarro, Chief Judge
17 United States District Judge
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